

***United States Court of Appeals  
for the Second Circuit***



**PETITIONER'S  
BRIEF**



# 75-4169

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IN THE  
**United States Court of Appeals**  
FOR THE SECOND CIRCUIT

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TRANS WORLD AIRLINES, INC.,

*Petitioner,*

—against—

CIVIL AERONAUTICS BOARD,

*Respondent.*

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ON PETITION FOR REVIEW OF ORDER OF  
THE CIVIL AERONAUTICS BOARD

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**BRIEF FOR PETITIONER**

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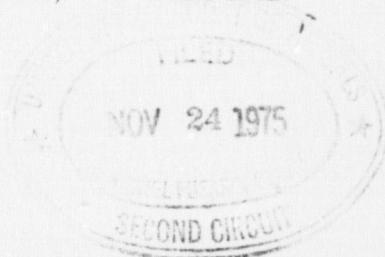
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**BRIEF FOR PETITIONER**

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**The Issue Presented for Review**

1. Whether the Civil Aeronautics Board by the adoption of Regulation SPR-85 authorizing U.S. supplemental air carriers and foreign charter air carriers to perform One-stop-inclusive Tour Charters has in effect authorized such carriers to sell air transportation to the general public on an individually ticketed basis, which does not constitute the sale of "charter trips", and has thus exceeded its statutory authority under §§ 101(36) and 401(d)(3) and 402(b) of the Federal Aviation Act of 1958, 49 U.S.C. §§ 1301(36), 1371(d)(3) and 1372(b).

## Statement of the Case

### A. Nature of the Case

Petitioner is a regularly scheduled United States air carrier holding certificates of public convenience and necessity issued by the Civil Aeronautics Board (the "Board") pursuant to Section 401(d)(1) of the Federal Aviation Act of 1958 (the "Act"), 49 U.S.C. § 1371(d)(1), authorizing petitioner to engage in interstate and foreign air transportation on both a scheduled and charter basis.

Petitioner seeks review of an order and regulation adopted by the Board which, by authorizing U.S. supplemental carriers to operate so-called One-stop-inclusive Tour Charters ("OTCs"), permits such carriers to provide air transportation to the general public on an individually ticketed basis. Since U.S. supplemental carriers may be and are licensed to engage only in *bona fide* charter operations, the order under review is beyond the Board's power under the Act. The Act requires the Board to preserve the distinction between charter and individually ticketed services.

### B. The Course of the Proceedings Below

By notice dated October 30, 1974 (EDR-281/SPDR-38/ODR-9) (1a),\* the Board invited comment upon its proposal to establish the "new class of charter designated as a One-stop-inclusive Tour Charter (OTC)."

Following receipt of comments, the Board on April 10, 1975 issued a Supplemental Notice of Proposed Rulemaking (EDR-281B/SPDR-38B/ODR-9B) (1a).

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\* References are to the Board's regulation under review set forth in petitioner's Appendix at pp. 1a-101a inclusive. Unless otherwise indicated, emphasis is supplied.

After consideration of the comments received in response to both the original Notice and the Supplemental Notice, the Board on August 7, 1975 adopted Regulation SPR-85 authorizing all direct air carriers to operate OTCs meeting the following requirements:

(a) The "tour" shall include ground accommodations and services, as defined;

(b) The charter must be for 40 or more seats;

(c) The charter must be on a round-trip basis (but a different carrier may operate the returning trip);

(d) The minimum duration of the charter must be 7 days (or 4 days in North America);

(e) The air transportation must be performed by direct air carriers (including U.S. supplemental and foreign charter carriers) holding certificates or permits issued by the Board;

(f) A passenger list must be filed with the Board 30 days prior to scheduled departure (or 15 days prior to such departure in the case of North American OTCs) containing a statement that each participant has entered into a contract with the tour operator and has made full payment for the tour;

(g) The tour price shall be not less than the price of the seat (*i.e.*, the charter price  $\div$  the number of seats) plus \$15 for each night of the tour. (46a-47a).

### **C. The Statutory Provisions Involved**

Under the Act U.S. supplemental air carriers may engage only in "supplemental air transportation." § 401(d)(3), 49 U.S.C. § 1371(d)(3).

"Supplemental air transportation" is defined as "charter trips, *including inclusive tour charter trips*, in air trans-

portation . . . to supplement the scheduled service authorized by certificates of public convenience and necessity issued pursuant to Sections 401(d)(1) and (2) of this Act." § 101(36), 49 U.S.C. § 1301(36).

**D. The Meaning of "Inclusive Tour Charter Trips"  
Under the Act**

**(a) Public Law 87-528**

In July 1962 Congress enacted Public Law 87-528, 76 Stat. 143, amending the Act so as to establish a comprehensive system for the certification and regulation of U.S. supplemental air carriers ("the 1962 amendment"). Under the 1962 amendment the Board was empowered to authorize these carriers to engage in "supplemental air transportation", which was defined as:

"charter trips, in air transportation . . . to supplement the scheduled service [of the regular route carriers] authorized by certificates of public convenience and necessity issued pursuant to sections 401(d)(1) and (2) of this Act."

The legislative history of the 1962 amendment has been examined in depth by the United States Court of Appeals for the District of Columbia Circuit and by this Court.\* Both Courts agreed that Congress intended to protect the scheduled airlines from individually ticketed operations by the supplementals.

The District of Columbia Court said that a primary purpose of the 1962 amendment was "to maintain the regulatory scheme of the Federal Aviation Act and the protection of the certificated carriers . . . by eliminating unregulated

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\* *American Airlines, Inc. v. CAB*, 365 F.2d 939 (D.C. Cir. 1966); *Pan American World Airways, Inc. v. CAB*, 380 F.2d 770 (2d Cir. 1967).

individually ticketed point-to-point competition from the supplementals." (365 F.2d at 944-45).

This Court said that "it must be remembered 'that a prime concern of Congress was to maintain the integrity of the charter concept—to preserve the distinction between group and individually ticketed travel.' *American Airlines v. Civil Aeronautics Board*, supra, 348 F.2d at 354. See Conference Report, H.R. Rep. No. 1950, 87th Cong., 2d Sess. 14 (1967)." (380 F.2d at 779).

**(b) The Board's Authorization of "Inclusive Tour Charter Trips"**

In 1966 the Board empowered the U.S. supplemental air carriers to conduct "inclusive tour charters." These were defined as round-trip tours combining air transportation and land services meeting the following requirements:

- (1) A minimum of seven (7) days must elapse between departure and return;
- (2) The land portion of the tour must provide overnight hotel accommodations at a minimum of three places other than the point of origin, such places to be no less than 50 air miles from each other;
- (3) The tour price must include all hotel accommodations and necessary air or surface transportation;
- (4) The tour package price must be no less than 110 percent of the lowest available fare charged by the scheduled air carriers for comparable individually ticketed traffic.

The United States Court of Appeals for the District of Columbia Circuit upheld the Board's action with respect to domestic inclusive tours in *American Airlines, Inc. v. CAB*, 365 F.2d 939 (1966).

This Court, however, held that the Board had exceeded its statutory powers in authorizing foreign inclusive tours. *Pan American World Airways, Inc. v. CAB*, 380 F.2d 770 (1967). This holding was subsequently *affirmed per curiam* by an equally divided court *sub nom. World Airways, Inc. v. Pan American World Airways, Inc.*, 391 U.S. 461 (1968).

(c) Public Law 90-514

In view of the holding of this Court in *Pan American World Airways, Inc.* that the Board did not have authority to permit supplementals to conduct "inclusive tour charters," the Board sought legislation from Congress "to give it such authority." On September 26, 1968, Congress enacted Public Law 90-514 authorizing the supplementals to conduct "inclusive tour charters."

Public Law 90-514 amended Section 101(33)\* of the Act to read as follows:

"(33) 'Supplemental air transportation' means charter trips, *including inclusive tour charter trips*, in air transportation, other than the transportation of mail by aircraft, rendered pursuant to a certificate of public convenience and necessity issued pursuant to section 401(d)(3) of this Act to supplement the scheduled service authorized by certificates of public convenience and necessity issued pursuant to sections 401(d)(1) and (2) of this Act. *Nothing in this paragraph shall permit a supplemental air carrier to sell or offer for sale an inclusive tour in air transportation by selling or offering for sale individual tickets directly to members of the general public, or to do so indirectly by controlling, being controlled by, or under common control with, a person authorized by the Board to make such sales.*" \*\*

\* Renumbered Section 101(36) by Public Law No. 93-366.

\*\* Additions shown by italics.

It is clear, on the face of the statute, that the new law only added the words "including inclusive tour charter trips" to the definition of "supplemental air transportation" in Section 101(23) of the Act, while precluding the supplementals from themselves selling such inclusive tours.

The Board only sought legislation permitting the supplementals to carry "inclusive tour charters." In considering the Board's proposal the Senate Committee pointed out that the purpose of the bill was to "give specific statutory authority to supplemental air carriers to conduct inclusive tour charter trips." (1968 S. Rep., p. 1).<sup>\*</sup> It added that the bill "*would leave supplemental air carriers in precisely the same position they were under the certificates of public convenience and necessity issued by the Board and the regulations prescribed by the Board prior to the adverse court decisions.*" (1968 S. Rep., p. 8).

The Senate Committee wanted it explicitly understood that "nothing in the bill shall violate or change the rules and regulations as prescribed by the Civil Aeronautics Board on individual ticketing." (1968 S. Rep., p. 7). The Committee reiterated its position stated at the time of the enactment of Public Law 87-528:

"[I]t is not the intention of the committee to permit individually ticketed service to be offered to the general public under the guise of charter. The proposed statutory definition, therefore, provides that charter shall not include such individually ticketed service whether offered by an air carrier directly or by a travel agent.

"This restriction is subject to one exception because there is one circumstance in which a carrier or

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<sup>\*</sup> "1968 S. Rep." refers to Sen. Rep. No. 1354, 90th Congress, 2d Session; "1968 H. Rep." refers to House Rep. No. 1639, 90th Congress, 2d Session.

travel agent may offer the services to individual members of the public and still conform to the traditional concept of charter. This is in connection with an all-expense-paid group tour. If a travel agent charters an aircraft for an all-expense-paid tour and then offers to individual members of the public the right to participate as a member of the group, this is a very different sort of service from individually ticketed transportation.'" (1968 Sen. Rep., p. 7).

The House Committee also stressed the limited scope of the legislation:

"The committee understands the position of CAB as supported by the Department of Transportation to be that the cloud which has been imposed by litigation should be lifted, and that the CAB should be in the position to continue its interpretation and authorization of inclusive tour charters as construed prior to the second circuit decision and the Supreme Court 4-to-4 affirmation. This is the precise intent of this committee. *The CAB's authority is clarified, not enlarged here.* The present requirement that tour operators, not supplemental air carriers, may offer inclusive tours and sell tickets to the general public will be required by statute. We would not otherwise disturb the flexibility of the CAB as to future rulemaking, but *we do strenuously urge and expect the CAB to continue to maintain the distinctions between the supplemental air carriers and the scheduled air carriers.* We believe that sufficient distinctions are made as to inclusive tours in the present requirements under part 378." (1968 H. Rep., p. 4).

The limited scope of the bill permitting the supplementals to carry inclusive tour charters was also emphasized in the debates in Congress.

Congressman Friedel, Chairman of the Subcommittee on Transportation and Aeronautics, made this clear:

"... I want to make certain that the record is clear that the Committee on Interstate and Foreign Commerce intends by this bill to clarify the Board's inclusive tour authority. It does not intend to enlarge the Board's authority." (114 Cong. Rec. 25058).

Congressman Staggers, Chairman of the Committee on Interstate and Foreign Commerce, also indicated the limited nature of Public Law 90-514. In response to an inquiry from another member of the Committee as to whether that law would relax the existing CAB limitations upon inclusive tours, Mr. Staggers stated:

"... The provisions of the bill are intended to button it down specifically in the bill. To elaborate a little more upon what the distinguished gentleman from Virginia has said, the tour must stop at three intermediate points; the tour must last 7 days. The tour includes ground transportation at each stop. It includes hotel accommodations at each one of the stops and the package price must be at least, 110 percent of what a scheduled airline would charge for the air service between the points involved." (114 Cong. Rec. 25052).

Congressman Moss, another member of the Committee, stated:

"... The report of the committee advises the Civil Aeronautics Board that any *modifications to the present regulations defining inclusive tour charter trips must clearly maintain the distinction between the inclusive tour charter services of the supplementals and the point-to-point, individually ticketed scheduled services of the route carriers.*" (114 Cong. Rec. 25053).

Thus the statute itself and the legislative history behind it makes it perfectly clear that the supplementals are to *supplement* the service of the scheduled carriers and that such supplementation is to be in the form of *bona fide* charter service which preserves the distinction between group and individually ticketed travel.

Manifestly, the 1968 amendment merely authorized the operation of "inclusive tour charters" and the purpose of the amendment was solely "to 'clarify' rather than add to the authority of the Board as originally granted in the 1962 legislation." *Saturn Airways, Inc. v. CAB*, 483 F.2d 1284, 1291 (D.C. Cir. 1973).

**E. *The "One-Stop-Inclusive Tour Charter" Is Not an "Inclusive Tour Charter Trip" Authorized by Congress Under the 1968 Amendment.***

As demonstrated above, the "inclusive tour charter trip" authorized by Congress under the 1968 amendment was clearly defined. The inclusive tour "must stop at three intermediate points; the tour must last 7 days. The tour includes ground transportation at each stop. It includes hotel accommodations at each one of the stops, and the package price must be at least, 110 percent of what a scheduled airline would charge for the air service between the points involved." (114 Cong. Rec. 25052).

The OTC which the Board would now authorize makes no pretense of meeting these conditions. In place of two intermediate stops in addition to the destination point the OTC has no true intermediate stops;\* in place of 7 days'

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\* The terminology "one-stop" inclusive tour charter is a misnomer, particularly since it implies a visit to several cities. It actually refers only to the fact that the charter is a round trip; the "one-stop" is merely the "stop" at the destination of the flight and not an intermediate stop between origin and destination.

duration, the OTC in North America need last only 4 days; and in place of a package price of 110 percent of the scheduled airline fare, the OTC price will "in many cases be cheaper than point-to-point scheduled air fares." (25a).

## I.

### **The Civil Aeronautics Board Exceeded Its Statutory Power in Authorizing U.S. Supplemental Carriers to Conduct One-Stop-Inclusive Tour Charters.**

Under the Act, the Board may only authorize the U.S. supplemental air carriers to operate "charter trips, including inclusive tour charter trips, in air transportation . . ." § 101(36), 49 U.S.C. § 1301(36). The OTCs, which the Board would now authorize the U.S. supplemental carriers to operate, are manifestly not "charter" trips as envisioned by the Congress in 1962 and 1968. The OTC is merely round-trip individually ticketed air transportation. And in authorizing the U.S. supplemental air carriers to operate OTCs, "the indistinct line between group (charter) and individually ticketed travel has been crossed." *Saturn Airways, Inc. v. CAB*, *supra*, 483 F.2d at 1288.

Under the OTCs, any North American passenger may go to a travel agent 15\* days in advance of his flight and buy a round-trip ticket. This is clearly individually ticketed travel.

The Board's opinion in authorizing the operation of OTCs makes this manifest. It is perfectly clear that in adopting the rules on OTCs the Board was not attempting to define the meaning of the term "charter" as it was used by Congress or as it had previously been used in air transportation, but was employing a device to permit so-called

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\* The Board anticipates reducing this period to 7 days (17a).

charter operators to carry more passengers at lower fares. The Board indicated that its primary objective was to make "low-cost bulk air transportation" available to the general public (4a). The Board says the OTC rule is needed "in order to increase the availability of low-cost transportation." (4a, fn. 10). The Board's desire is simply "to make low-cost bulk air travel more available to the traveling public." (18aa). While these may be worthy objectives, the worthiness of the objective obviously does not justify the Board in corrupting the plain meaning of the word "charter", and in doing so to rewrite the Act.

The proliferation of types of "charters" authorized by the Board since 1968 surpasses the wildest nightmares of a professor of semantics.\* Today, the Board itself admits that it is unsure of just what is happening in the "evolving complexity of the charter field." \*\* The Board admits that it lacks data as to charters on (1) "load factors for passengers," (2) "revenue," "market rates and yields," (3) "good information on the air travel origins and destinations of charter groups," (4) "the relationship of charter service to scheduled service," and (5) "seasonality of charter markets." \*\*\*

It is no wonder that the Board admits that it lacks data on the relationship of charter service to scheduled service. The Board, by its regulations, has deliberately attempted to increase the scope of service rendered by the supple-

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\* The Board's "charter" types include: Advance Booking (AB), Travel Group (TG), Pro Rata Prior Affinity (PR), Common Purpose (CP), Entity (EP), Overseas Military Personnel (OM), Study Group (SG), Special Event (SE), Inclusive Tour (IT), Foreign Rule ITC (FT). To this assortment, the Board would now add the One-stop-inclusive Tour Charter (OTC) here challenged.

\*\* EDR-287 (September 18, 1975), Explanatory Statement, p. 2.

\*\*\* EDR-287 (September 18, 1975), Explanatory Statement, p. 3.

mentals. In fact, the Board has referred to its continuing broadening of the term "charter" as its "step-by-step development of low-cost bulk transportation." \*

Here then, is the key to the policy on which the Board has deliberately embarked, ignoring the express limitation on its authority to authorize "supplemental" air transportation. The Board intends to authorize the supplemental carriers to enter the "low-cost bulk transportation" market, even though the transportation involved is clearly "scheduled" and not "charter" transportation.

However desirable a national policy it may be to increase the operating authority of the U.S. supplemental carriers so as to permit them to provide "low-cost bulk travel," this is a matter for Congress—not the Board—to decide. The "fact is that the Board is entirely a creature of Congress and the determining question is not what the Board thinks it should do but what Congress has said it can do." *CAB v. Delta Air Lines, Inc.*, 367 U.S. 316, 322 (1961).

The question of permitting the U.S. supplemental air carriers entry into the "low-cost bulk travel market" is a major policy decision which the Board may not make. The Supreme Court has repeatedly stated that where Congress has expressed a limitation it is not for the administrative agency to rewrite the law. In *FTC v. Raladam Co.*, 283 U.S. 643 (1931), the Supreme Court held that the Federal Trade Commission had acted beyond its power, saying:

"Official powers cannot be extended beyond the terms and necessary implications of the grant. If broader powers be desirable, they must be conferred by Congress. They cannot be merely assumed by administrative officers. . . ." (*id.* at 649).

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\* EDR-287 (September 18, 1975), Explanatory Statement, p. 2.

If the time has come to reevaluate the basic scope of the supplementals' authority, it is up to Congress, not the Board, to make the reevaluation. See *NLRB v. Insurance Agents' Int'l Union, AFL-CIO*, 361 U.S. 477 (1960) and *H. K. Porter Co. v. NLRB*, 397 U.S. 99 (1970).

## II.

### **The "Restrictions" the Board Has Placed on Its One-Stop-Inclusive Tours Do Not Make Them Charter Trips.**

The Board argues that the "restrictions on OTC's . . . although differing significantly from those applied in our TGC rule, are nonetheless sufficient to maintain the legally required distinction between charter and individually ticketed service . . ." (4a).

The Board's claim that the "restrictions" it has imposed on OTCs qualified them as "charters," rather than individually ticketed service, is specious. The Board has made no attempt to fit its "restrictions" into any established definition of "charter". Indeed, the Board's sole claim is that its "restrictions" will limit the number of passengers who can use OTCs. This, of course, has nothing to do with the legal meaning of "charter".

In *Saturn Airways, Inc. v. CAB*, *supra*, 483 F.2d 1284, the Court upheld the Board's Travel Group Charter (TGC) rule, saying:

"An elaboration of the intricacies of the TGC regulations would serve little purpose. We have studied them carefully and find that they maintain the necessary distinction between group and individually ticketed travel, and that they are the result of painstaking and reasoned analysis by the Board. We are impressed with the five 'substantial and vital' differences between

TGCs and conventional travel that have been stressed by the Board in its argument before us: (1) *The TGC traveler is a party to the charter contract itself, incurring liability for the pro rata share of the charter cost and running the risk that his cost may increase depending upon the load factor ultimately achieved.* (2) *The travel group must be formed no less than three months prior to the scheduled departure time, or the trip must be cancelled.* (3) *The members of the group formed in ¶2 above must have paid a deposit of 25 percent of the minimum pro rata charter price before the time for filing the list of tour members with the Board has elapsed, no more than four nor less than three months prior to the scheduled departure. This deposit is, subject to certain exceptions, nonrefundable. Payment of the balance must then be made not later than two months before departure. As of then the participant risks, again subject to certain exceptions, a 100 percent forfeiture should he desire to change his plans.* (4) *There is a risk of cancellation of the flight up to 45 days prior to scheduled departure because of defaults by fellow charter participants.* (5) *All TGC participants must go and return as a group, subject to predetermined, fixed restrictions as to the length of the trip.*" (*Id.* at 1292).\*

Under the Board's OTC regulation, the sole requirement left of the intricacies of the Board's Travel Group Charter regulations which impressed the *Saturn* Court is the requirement that OTC participants must go and return as a group, subject to the restriction as to the length of the trip.

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\* As hereinafter delineated, "differences" (1), (2), (3) and (4), italicized above, have been eliminated by the Board in its OTC regulation. Of the "differences" which impressed the *Saturn* Court, only (5) remains in effect.

In *Pan American World Airways, Inc. v. CAB*, 517 F.2d 734 (2d Cir. 1975), this Court upheld the Board's foreign originating travel group charter (TGC/ABC) regulations. This Court gave two basic reasons for this decision.

One was that this Court found considerations of international comity as a "special reason" for deference to the administrative experience and expertise of the Board. See *id.* at 745-46. Here no considerations of international comity are involved. Indeed the Board has pointed out that "some foreign governments authorize only limited charter operations, or entirely preclude them." (6a).

This Court also upheld the Board's TGC/ABC regulations on the ground that the restrictive conditions there imposed "[t]aken together . . . maintain the required distinction between charter services and that of the regularly scheduled airlines." (517 F.2d at 746). It said:

"Viewed as a whole, the various restrictions and limitations imposed in the Board's regulation maintain substantial and vital differences between TGC/ABC service and conventional service available to the individual traveler. These distinctions include the following:

1. At least 90 days in advance of flight departure, TGC/ABC participants are contractually bound to pay for a specifically identified flight. Individually ticketed travelers, on the other hand, need not incur any contractual obligation prior to the flight. They are free to reserve, change their reservations, and cancel when they please.

2. There are other substantial restrictions, which limit passenger flexibility. All TGC/ABC participants must go and return together as a group. There can be no intermingling of passengers from different groups and no one-way passengers. Moreover, TGC/ABC par-

ticipants are subject to predetermined fixed restrictions on the length of their trips. In sharp contrast, no restrictions are placed on an individually ticketed traveler. Such a passenger may purchase a one-way or round trip ticket. He need not be 'locked' into any specified length of stay or date of return. The individually ticketed passenger can cut short his trip, extend it, make up his mind when to return after he reaches his destination, or decide not to return at all.

3. The TGC/ABC restrictions necessitate a significant risk of flight cancellations up to the date of departure. Each TGC/ABC contract must cover at least forty seats and generally will involve a substantially greater number. Participants must be drawn exclusively from the list of 'actual participants' (persons contractually bound to pay for a specifically identified flight at least ninety days in advance of flight departure) or the list of 'standbys' (eligible list of substitute participants formed not less than 90 days in advance of the flight whose number cannot exceed the number of seats contracted for on non-prorated TGC/ABC flights). If substantial numbers of participants default or cancel and cannot be replaced by 'standbys', the charterer can choose to abort the flight rather than incur a financial loss. Thus, while the TGC/ABC rules do not mandate flight cancellation under specified circumstances, neither do they forbid contractual provisions authorizing cancellations.<sup>8</sup> In contrast, the individually ticketed passenger faces no such uncertainty." (*Id.* at 742).

Under the Board's OTC regulation, however, virtually none of the foregoing distinctions remain.

For example, there is no requirement that "at least 90 days in advance of flight departure" OTC participants be "contractually bound to pay for a specifically identified

flight". The regulation does provide that only those persons whose names appear on a passenger list previously filed with the Board (15 days for North American OTCs) can be participants. However, it contains no requirement that participants be contractually bound to pay for the flight.\* As the Board itself points out, the "participant's ability to change plans, to cancel or to obtain a refund" are only "subject to whatever additional terms the tour operator chooses to apply . . ." (12a).

While the OTC regulation does provide, as specified in (2) above, that there "shall be no intermingling of passengers and each planeload group, or less-than-planeload group, shall move together as a group . . ." (48a), there is, in fact, no effective prohibition against "intermingling" of charter groups. There can be eight different "less-than-planeload groups" on one airplane and each one of these groups can return on a different carrier (§ 378a.10(c); 46a).

Moreover, the OTC restrictions do not "necessitate a significant risk of flight cancellations up to the date of departure", as specified in (3) above. Instead, the OTC regulation is deliberately drawn so that the OTC operator can assume, without flight cancellation, the "entrepreneurial risk entailed by a failure to resell all of the seats . . ." (3a). This leads the travel agent to advertise "we pay for empty seats. (It's our risk!)." Appendix A, *infra*.\*\*

As a result, the Board's OTC regulation has now watered down the term "charter" so that, in lieu of the TGC and TGC/ABC restrictions, which the courts have considered "substantial and vital",\*\*\* the only restriction left is that

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\* While the Board states that it expects that tour operators will minimize their financial risk by imposing reasonable penalty conditions upon cancelling participants, it states specifically that the regulation "does not in terms impose any cancellation requirements . . ." (13a, fn. 22).

\*\* Travel advertisement, *New York Times*, October 26, 1975, Section 10, p. 28.

\*\*\* See 517 F.2d at 742; 483 F.2d at 1292.

all OTC participants "must go and return as a group, subject to predetermined, fixed restrictions as to the length of the trip." *Saturn Airways, Inc. v. CAB, supra*, 483 F.2d at 1292. Manifestly, this restriction does not make OTCs "charter trips" supplementing the service of the scheduled airlines.

As shown in Appendix A, *infra*, travel agents will now advertise "there's just one condition" an OTC participant must meet to benefit by the unprecedented low price of OTCs. Payment for an international OTC "must be completed as soon as possible but not later than 31 days before departure (And why is even this necessary? Just call us and we'll let you in on the secret). As you see, it is to your advantage to plan early and avoid paying more for the same thing. . ."

In authorizing OTCs, the Board would permit the U.S. supplemental carriers to compete directly for the "mass market". The Board would thus eradicate the distinction between scheduled carriers and supplemental carriers in direct contravention of the Act. The prediction of former Board Chairman Browne that, as "competition by both scheduled and charter carriers for the mass transport market" develops, "the principal justification for two classes of carriers will evaporate" and the "two classes will necessarily blend into one", is now realized by the Board in its OTC regulation.\*

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\* Speech of Secor D. Browne, Chairman, Civil Aeronautics Board, Royal Aeronautical Society, London, England, December 7, 1972.

**CONCLUSION**

The Board's OTC regulation should be set aside.

Respectfully submitted,

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November 24, 1975

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Petitioner,	:	<u>CERTIFICATE OF</u>
	:	<u>SERVICE</u>
v.	:	Index No. 75-4169
CIVIL AERONAUTICS BOARD,	:	
Respondent.	:	

----- x

STATE OF NEW YORK )  
: ss.:  
COUNTY OF NEW YORK )

HAROLD L. WARNER, Jr., being duly sworn, deposes and  
says:

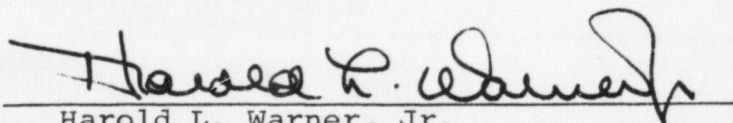
1. I am attorney for petitioner in this case.
2. Pursuant to Rule 25(d) of the Federal Rules of Appellate Procedure, I hereby certify that I have served on counsel for each party separately represented two (2) copies of petitioner's brief and one copy of the appendix in this case, in conformance with Rules 30(a) and 31(b) of the Federal Rules of Appellate Procedure by mailing the same on this 24th day of November 1975 addressed as follows:

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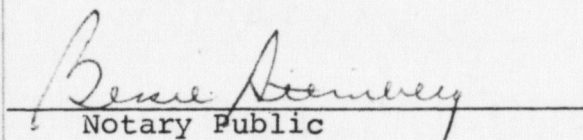
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Harold L. Warner, Jr.  
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Subscribed and sworn to before  
me this 24th day of November, 1975.

  
Notary Public

BESSIE STEINBERG  
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Yours, &c.,

CHADBOURNE, PARKE, WHITESIDE & WOLFF

Attorneys for

30 Rockefeller Plaza,

Borough of Manhattan,

New York, N.Y. 10020

To

Attorney for

Sir :

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entered in the office of the Clerk of this Court, at  
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Dated, New York,

19

Yours, &c.,

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To

Attorney for

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FOR THE SECOND CIRCUIT

TRANS WORLD AIRLINES, INC.,

Petitioner,

v.

CIVIL AERONAUTICS BOARD,

Respondent.

CERTIFICATE OF SERVICE

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